**Holcomb & Hoke Mfg. Co., Inc. *and* United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO, CLC.** Case 25–CA–31014

January 25, 2010

## DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint and has failed to file an answer to the compliance specification. Upon a charge and an amended charge filed by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO, CLC (the Union) on May 18 and June 30, 2009, respectively, the General Counsel issued the complaint on August 28, 2009, against Holcomb & Hoke Mfg. Co., Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the Act. Thereafter, on September 10, 2009, the Respondent filed an answer to the complaint. On October 7, 2009, the General Counsel issued an order consolidating complaint and compliance specification, compliance specification, and notice of hearing (the consolidated complaint and compliance specification). By letter dated October 14, 2009, the Respondent withdrew its answer to the complaint and informed the General Counsel that it did not intend to contest the allegations set forth in the consolidated complaint and compliance specification. Accordingly, the Respondent failed to file an answer to the consolidated complaint and compliance specification.

On November 20, 2009, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on November 23, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 4, 2009, the Respondent filed a response reiterating its reasons for not contesting the General Counsel's Motion for Default Judgment, as stated in the Respondent's October 14, 2009 letter withdrawing its answer. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment[1]

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Similarly, Section 102.56 of the Board's Rules and Regulations provides that the allegations in a compliance specification will be taken as true if an answer is not filed within 21 days from service of the compliance specification. In addition, the consolidated complaint and compliance specification affirmatively stated that unless an answer was received by October 28, 2009, the Board may find, pursuant to a motion for default judgment, that the allegations in the consolidated complaint and compliance specification are true.

Here, although the Respondent filed an answer to the complaint on September 10, 2009, it subsequently withdrew its answer by letter dated October 14, 2009. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[2]

Accordingly, based on the withdrawal of the Respondent's answer to the complaint, and in the absence of good cause being shown for the failure to file an answer to the consolidated complaint and compliance specification, we deem the allegations in the complaint and in the consolidated complaint and compliance specification to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Indianapolis, Indiana (the Respondent's facility), has been engaged in the manufacture and sale of partitions, operable walls,

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, ___F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct.488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009)(No. 09-213); But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] See *Maislin Transport*, 274 NLRB 529 (1985).

and accordion doors. During the 12-month period ending May 17, 2009, the Respondent, in conducting its business operations described above, sold and shipped from its Indianapolis, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana, and purchased and received at its Indianapolis, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Vincent Herndon–Co-owner/President

Steven Giese–Co-owner/Executive Vice President

Jeff Browning–Personnel Manager

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Respondent, BUT EXCLUDING salaried, clerical, installation instructors, field service technicians, sales forces employees, all employees whose regular place of work is not at the Indianapolis, Indiana Plant of Respondent, and all guards and supervisors as defined in the Act.

Since about the 1930s and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 13, 2008, to July 9, 2011.

At all times since the 1930s, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About February 6, 2009, the Respondent failed to continue in effect all the terms and conditions of the agreement described above by repudiating the agreement, including by: failing to process grievances filed by the Union, collecting union dues from employees in the unit but failing to remit such dues to the Union, collecting AFLAC insurance premium moneys from employees in the unit but failing to remit such moneys to the insurance company, failing to pay employees for 2008 vacation and personal days due and owing under the above agreement, and failing to contribute to the employees' 401(k) plan the contributions due and owing under the above agreement.

The Respondent engaged in the conduct described above without the Union's consent.

About February 6, 2009, the Respondent ceased operations at its facility.

About February 23 and March 11, 2009, respectively, by letters sent via certified mail, the Union requested that the Respondent bargain collectively about the effects on unit employees of the plant closure.

The Respondent ceased operations at its facility without affording the Union an opportunity to bargain with the Respondent with respect to the effects on unit employees of the plant closure.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

## CONCLUSIONS OF LAW

1. By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

2. By ceasing operations at its facility without affording the Union an opportunity to bargain with the Respondent with respect to the effects on unit employees of the plant closure, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and 8(d), and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by repudiating its 2008–2011 collective-

bargaining agreement with the Union by, inter alia, failing to process grievances filed by the Union, we shall order the Respondent, on request, to honor the terms and conditions of its 2008–2011 collective-bargaining agreement by processing grievances filed by the Union that have not been processed since February 6, 2009.

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by repudiating its 2008–2011 collective-bargaining agreement with the Union by failing to remit to the union dues deducted from the paychecks of unit employees pursuant to the parties' 2008–2011 collective-bargaining agreement, we shall order the Respondent to remit to the Union the amount set forth in appendix AA of the consolidated complaint and compliance specification, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, having found that the Respondent has violated Section 8(a)(5) and (1) by repudiating its 2008–2011 collective-bargaining agreement with the Union by failing to pay vacation pay and personal leave pay to unit employees and failing to remit contractually required contributions for AFLAC insurance premiums and employee 401(k) plans, we shall order the Respondent to make the unit employees whole by paying them the amounts set forth in the compliance specification, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, supra, and minus tax withholdings required by Federal and State laws.[3]

To remedy the Respondent's unlawful failure to bargain with the Union about the effects of its decision to cease its operations, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed to make whole the unit employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), as clarified in *Melody Toyota*, 325 NLRB 846 (1998).

Pursuant to *Transmarine*, the Respondent typically would be required to pay its unit employees' backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of ceasing its business and discontinuing its operations on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

*Transmarine* provides that the sum paid to these unit employees may not exceed the amount they would have earned as wages from the date on which the Respondent ceased doing business at the facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, *Transmarine* further provides that in no event shall this sum be less than the unit employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay is typically based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and is computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, supra.

Here, in the circumstances of the Respondent's cessation of operations, the General Counsel in the consolidated complaint and compliance specification seeks only the minimum 2 weeks of backpay due the unit employees under *Transmarine.* Appendices A through Z of the consolidated complaint and compliance specification set forth the amount due each employee. We shall grant the General Counsel's request and order the Respondent to pay those amounts to the discriminatees, plus interest accrued to the date of payment.

[3] In the complaint, the General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham,* 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

Finally, in view of the fact that the Respondent's facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Holcomb & Hoke Mfg. Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO, CLC, as the exclusive collective-bargaining representative of the employees in the unit set forth below, with respect to the effects of its decision to cease operations at its Indianapolis, Indiana facility:

> All employees of the Respondent, BUT EXCLUDING salaried, clerical, installation instructors, field service technicians, sales forces employees, all employees whose regular place of work is not at the Indianapolis, Indiana Plant of Respondent, and all guards and supervisors as defined in the Act.

(b) Repudiating its 2008–2011 collective-bargaining agreement with the Union by:

- failing to process grievances filed by the Union;
- failing to remit dues to the Union that were collected from employees in the unit;
- failing to remit AFLAC insurance premium monies to the insurance company that were collected from employees in the unit;
- failing to contribute to the employees' 401(k) plan the contributions due and owing under the collective-bargaining agreement; and
- failing to pay employees for 2008 vacation and personal days due and owing under the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union concerning the effects on unit employees of its decision to cease operations at its Indianapolis, Indiana facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) On request, honor the terms and conditions of its 2008–2011 collective-bargaining agreement with the Union by processing grievances filed by the Union that have not been processed since February 6, 2009.

(c) Remit to the Union all dues that were collected from unit employees pursuant to the parties' 2008–2011 collective-bargaining agreement that have not been remitted to the Union, by paying to the Union $2545.06, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of its failure to pay vacation pay and personal leave pay to unit employees, and for its failure to remit contractually-required contributions for AFLAC insurance premiums and employee 401(k) plans, and for its failure to bargain with the Union concerning the effects on unit employees of its decision to cease operations at its Indianapolis, Indiana facility, by paying the individuals named below the amounts following their names, plus interest accrued to the date of payment as set forth in *New Horizons for the Retarded*, supra, and minus tax withholdings required by Federal and State laws.[4]

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed

[4] The compliance specification alleges that five named employees are also entitled to reimbursement for unpaid medical claims, pursuant to sec. 16 of the parties' collective-bargaining agreement, which provided for specified medical coverage and reimbursement to employees. The Respondent has failed to file an answer to the compliance specification, and has thereby admitted that these employees are entitled to reimbursement in the amounts specified. Further, the complaint requests a make whole remedy for any losses resulting from the Respondent's failure to continue in effect all terms and conditions of the agreement. Accordingly, we have included the medical payments listed below and in the compliance specification as part of the amounts that the Respondent shall pay the individuals named below. In addition, we have corrected two inadvertent typographical errors in the amounts specified, which do not affect the total amounts due to employees.

by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[5] to the Union and to all unit employees who were employed by the Respondent at its Indianapolis, Indiana facility at the time it ceased operations on February 6, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 25, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL–CIO, CLC, as the exclusive collective-bargaining representative of the employees in the unit set forth below, over the effects of our decision to cease operations at our Indianapolis, Indiana facility:

> All employees of the Respondent, BUT EXCLUDING salaried, clerical, installation instructors, field service technicians, sales forces employees, all employees whose regular place of work is not at our Indianapolis, Indiana Plant, and all guards and supervisors as defined in the Act.

WE WILL NOT repudiate our 2008–2011 collective-bargaining agreement with the Union by:

- failing to process grievances filed by the Union;
- failing to remit dues to the Union that were collected from employees in the unit;
- failing to remit AFLAC insurance premium monies to the insurance company that were collected from employees in the unit;
- failing to contribute to the employees' 401(k) plan the contributions due and owing under the collective-bargaining agreement; and
- failing to pay employees for 2008 vacation and personal days due and owing under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union concerning the effects on the unit employees of our decision to cease operations at our Indianapolis, Indiana facility on February 6, 2009, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL, on request, honor the terms and conditions of our 2008–2011 collective-bargaining agreement with the Union by processing grievances filed by the Union that have not been processed since February 6, 2009.

WE WILL remit to the Union all dues that were collected from unit employees pursuant to our 2008–2011 collective-bargaining agreement with the Union that have not been remitted to the Union, by paying to the Union $2545.06, plus interest.

WE WILL make the unit employees whole for any loss of earnings and other benefits suffered as a result of our failure to pay vacation pay and personal leave pay to unit

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees, and for our failure to remit contractually required contributions for AFLAC insurance premiums and employee 401(k) plans, and for our failure to bargain with the Union concerning the effects on unit employees of our decision to cease operations at our Indianapolis, Indiana facility, by paying them the amounts following their names, plus interest accrued to the date of payment, minus tax withholdings required by Federal and State laws.

HOLCOMB & HOKE MFG. CO., INC.